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THIRTEENTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

Mr. Doudou THIAM, Special Rapporteur

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I. INTRODUCTION

1. In his twelfth report 1/ on the draft Code of Crimes against the Peace and Security of Mankind, the Special Rapporteur announced his intention of limiting the list of such crimes to offences whose characterization as crimes against the peace and security of mankind was hard to challenge.

2. This report will attempt to keep that promise. It will doubtless be a difficult and delicate task, given the opposing tendencies that exist within the Commission: an expansive tendency that favours as comprehensive a Code as possible and a restrictive tendency that wants the scope of the Code to be as narrow as possible.

3. Proposing a definitive list of the offences to be included poses something of a dilemma. If the Special Rapporteur follows the maximalist tendency, he runs the risk of reducing the draft Code to a mere exercise in style, with no chance of becoming an applicable instrument. Conversely, if he follows the restrictive tendency, he could end up with a mutilated draft.

4. Having studied the criticisms and observations made by Governments, 2/ the Special Rapporteur is proposing a more restricted list than that adopted on first reading. This is what the vast majority of Governments want. In order for an internationally wrongful act to become a crime under the Code, not only must it be extremely serious but the international community must decide that it is to be included. Extreme seriousness is too subjective a criterion and leaves room for considerable uncertainty. Other factors, notably technical and political ones, are involved in the drafting and adoption of a Code of Crimes against the Peace and Security of Mankind.

5. From a technical standpoint, the diversity of legal systems complicates the task of defining an international offence.

6. From a political standpoint, any codification exercise must, in order to be successful, be supported by a clearly expressed political will. In the present case, this means not just one political will but the convergence of several political wills. Since this convergence of wills has proved difficult to achieve on a large number of draft articles, the Special Rapporteur has been forced to reduce the list proposed on first reading. 3/

1/ A/CN.4/460 and Corr.1.

2/ A/CN.4/448 and Add.1.

3/ The list proposed on first reading was the following: 1. aggression; 2. threat of aggression; 3. intervention; 4. colonial domination and other forms of alien domination; 5. genocide; 6. apartheid; 7. systematic or mass violations of human rights; 8. exceptionally serious war crimes; 9. recruitment, use, financing and training of mercenaries; 10. international terrorism; 11. illicit traffic in narcotic drugs; 12. wilful and severe damage to the environment.

7. The draft articles submitted to Governments met with a varied reception. There was strong opposition to some of them on the part of several Governments, while others were the subject of reservations or criticisms as to their form or their substance.

8. The draft articles that fall into the first group are the following: (a) draft article 16 on the threat of aggression; (b) draft article 17 on intervention; (c) draft article 18 on colonial domination and other forms of alien domination; and (d) draft article 26 on wilful and severe damage to the environment.

9. The Special Rapporteur believes that the Commission should beat a retreat on these draft articles and abandon them for the time being. There was little support for the draft articles on the threat of aggression and intervention because Governments found them vague and imprecise. They fail to meet the standards of precision and rigour required by criminal law.

10. The draft articles on colonial domination and other forms of alien domination and wilful and severe damage to the environment were equally unpopular with Governments that expressed an opinion on them. Although article 19 of the draft articles on State responsibility characterizes as international crimes both colonial domination and other forms of alien domination and serious damage to the human environment, for the time being these draft articles do not seem to have convinced Governments. We shall have to wait until developments in international law confirm or reverse the tendency to consider these acts as crimes.

11. That leaves the draft articles on which there were reservations, namely: 1. article 20 on apartheid; 2. article 23 on the recruitment, use, financing and training of mercenaries; 3. article 24 on international terrorism; and 4. article 25 on illicit traffic in narcotic drugs.

12. Several observations were made about apartheid:

(a) One Government said that it had no substantive objections but proposed dropping the word "apartheid" and replacing it by the words "institutionalized racial discrimination";

(b) Two Governments felt that apartheid came under the "systematic or mass violations of human rights" covered by draft article 21 and that there was no need to devote a specific article to it;

(c) Two other Governments took the view that since apartheid had been dismantled in the one country where it had been applied, it no longer had a place in the draft.

13. The Special Rapporteur believes that even if the word "apartheid" is dropped, there is no guarantee that the phenomenon to which it refers will not reappear. As a result, the proposal to replace the word "apartheid" by the words "institutionalization of racial discrimination" is not without interest. However, rather than propose a new draft article on apartheid, the Special Rapporteur will abide by whatever position the Commission takes.

14. Let us now turn to draft article 23 on the recruitment of mercenaries. According to some Governments, this phenomenon is neither widespread nor sufficiently serious to be included in the Code. Besides, the Convention on mercenaries has been signed by only a handful of countries.

15. The Special Rapporteur thinks that these criticisms are groundless. The phenomenon could well re-emerge in some parts of the world, particularly the underdeveloped world, and disrupt peace and security. He believes, however, that the acts covered by the draft article could be prosecuted as acts of aggression and that there might, as a result, be no need to devote a separate article to them.

16. On the other hand, the Special Rapporteur believes that the Commission should retain the draft article on terrorism, with some changes. For instance, it should be recognized that not only agents or representatives of a State may commit terrorist acts, but also private individuals acting as members of a group, movement or association. The draft article proposed by the Special Rapporteur for the second reading takes this possibility into account.

17. This leaves draft article 25 on traffic in narcotic drugs, which prompted some questions. According to one Government, "It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them".

18. Governments which asked this question are perhaps unaware that it was at the request of other Governments that the Commission was instructed to prepare a draft statute for an international criminal court. Drug traffickers have formed powerful organizations which can threaten the stability and security of some States. Those who question the appropriateness of targeting narcotic drug trafficking in the Code would do well to consider the following observation by the Swiss Government: "After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of 'narcoterrorism'. Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include, in the draft Code, a provision criminalizing such traffic, whether it is carried out by agents of a State or simply by individuals." 4/

19. The considerations summarized above prompted the Special Rapporteur to substantially reduce the draft adopted on first reading. The offences that remain are thus the following:

4/ A/CN.4/448, chap. III, reply from Switzerland, art. 25.

(a) Aggression;

(b) Genocide;

(c) Crimes against mankind;

(d) War crimes;

(e) International terrorism;

(f) Illicit traffic in narcotic drugs.

20. This reduces the number of offences from 12 to 6. The present report will deal with those six offences. There may be some for whom even this list will be too long and who will say that the content of the Code must be pared down still further. That will be for the Commission to decide.

21. However, one last observation is in order. It will have been noted that Governments did not respond to the request that they propose a penalty for each crime.

22. The reason for this is that it is difficult to determine a specific penalty for each crime. In one of his reports on applicable penalties, the Special Rapporteur proposed that, instead of fixing a penalty for each offence, a scale of penalties should simply be established, leaving it up to the courts concerned to determine the applicable penalty in each case.

23. In fact, all the offences covered in the Code are considered to be extremely serious and it would be difficult, in the Code, to stipulate different penalties for offences which are uniformly considered to be extremely serious. Only the courts can determine what penalty would be just, given the circumstances of each case and the personality of the accused.

24. This has, moreover, been the method followed by the charters or statutes of international criminal courts. According to the Charter of the Nürnberg International Military Tribunal (art. 27), "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just". Similarly, according to the Charter of the International Military Tribunal for the Far East (art. 16), "The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just".

25. Closer to home, the Statute of the International Criminal Tribunal for the former Yugoslavia provides (art. 24): "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".

26. Lastly, according to the draft Statute for an international criminal court adopted by the Commission at its most recent session (art. 47):

"1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

(a) the State of which the convicted person is a national;

(b) the State where the crime was committed; and

(c) the State which had custody of and jurisdiction over the accused."

27. One notes the flexibility of these various provisions, which give the courts a certain latitude, albeit within certain established limits, of course.

28. This is the course that the Special Rapporteur had proposed. Such an approach does not conflict with the principle of nullum crimen sine lege because the Statute itself guides the courts and indicates the minimum and maximum penalties.

29. It is now for the Commission, given the silence of Governments on the matter of applicable penalties, to choose which course to follow.

30. If it decides to establish in the Statute itself the penalties applicable to each crime, this method could come up against the difficulty of reaching an agreement, within the Commission, on appropriate penalties. If such an agreement is not reached, it will be necessary to resort to one of the methods outlined above.

31. It is regrettable that the draft Statute for an international criminal court, as recently prepared by the Commission, determined the applicable penalties when this should normally have been done in the draft Code. The Commission will have to take this situation into account when it comes to deal, in the draft Code, with the problem of the penalties applicable to crimes against the peace and security of mankind.

II. DRAFT ARTICLES

PART II

CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 15. Aggression

A. Text of the draft

32. The draft article approved on first reading was the following:

"1. An individual who as leader or organizer plans, commits or orders the commission of an act of aggression shall, on conviction thereof, be sentenced to:

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. Any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any

extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration."

B. Observations of Governments

Australia

33. The Australian Government takes the view that draft article 15 encompasses, in addition to wars of aggression, unjustified acts of aggression short of war. This goes beyond existing international law which criminalizes wars of aggression only. While the international community would identify acts of aggression short of wars of aggression as illegal and hold the delictual State responsible for its illegality, it does not follow that the international community is willing to recognize that individuals in the delictual State are guilty of international crimes. Australia considers that the implications of criminalizing individual acts in these circumstances should be further considered.

34. A further difficulty arises for Australia from the reference in draft article 15 to the Security Council. The definition of aggression both includes (draft article 15 (4) (h)) "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter" and

excludes (draft article 15 (3)), acts which the Security Council determines not to be acts of aggression because of other relevant circumstances. The relationship between the Code and the Security Council is an exceptionally difficult problem, as the Commission notes. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council.

Belarus

35. While welcoming the inclusion in article 15 of responsibility for the planning of aggression, the competent bodies of Belarus consider that the list of criminal acts should also include the preparation of aggression, particularly since planning is only one of the elements of preparation.

36. According to the Government of Belarus, with regard to the distinction made in the article between the functions of the Security Council and those of the judicial authorities, it should be noted that the distinction can be viewed only as a temporary measure. If the Security Council's determination as to the existence of an act of aggression is to have binding force on national courts, what is needed, in our view, is not only a legal formulation of this obligation in an international treaty, but also the existence and observance of some juridical procedure (for example, a requirement for the preliminary establishment of a commission of investigation), which would guarantee the objectivity of the Council's decision. Clearly this decision can in no way prejudge the question of the guilt of a particular individual in committing aggression.

37. Belarus also notes that if an international criminal court is established within the United Nations, the question of the delimitation of competence between it and the Security Council will require further study.

Paraguay

38. The Government of Paraguay states that, in answer to the request of the International Law Commission, it would like to make a few comments on the provisions of the draft Code. Some, for example the one concerning article 15, relate simply to form or legislative technique. Article 15 states - as do others - that an individual who ... commits one of the crimes specified in the draft Code "shall, on conviction thereof, be sentenced ...". The phrase "on conviction thereof" is clearly redundant, for a person cannot be sentenced until he has been tried and found guilty.

United Kingdom of Great Britain and Northern Ireland

39. The United Kingdom has grave doubts concerning article 15. According to the Government, most of this article is a repetition of the definition of aggression contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. That resolution was intended to assist the General Assembly and the Security Council by clarifying a key concept in the Charter of the United Nations, but one which has been left undefined. The United Kingdom agrees entirely with those members of the Commission who considered that a

resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. It is patently insufficient for the commentary to suggest that this criticism is met by failing to mention the resolution by name. The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility. Paragraph 4 (h) offends against the principle of nullum crimen sine lege, as well as operating with potential retrospective effect in contravention of article 10.

United States of America

40. The United States Government notes that the Code's definition of aggression is taken from the General Assembly's 1974 definition of aggression (resolution 3314 (XXIX)). The General Assembly, however, did not adopt this definition for the purpose of imposing criminal liability, and the history of this definition shows that it was intended only as a political guide and not as a binding criminal definition.

Switzerland

41. The Swiss Government considers that the proposed definition of aggression rests mainly - and with perfect justification - on that contained in General Assembly resolution 3314 (XXIX) of 14 December 1974. That, however, is a text intended for a political organ. Moreover, under the terms of Article 39 of the Charter of the United Nations, it is the Security Council which is responsible for determining the existence of any threat to the peace, breach of the peace, or act of aggression. The question, therefore, is whether the national judge should be bound by the Council's determinations. In some respects, this would appear desirable. Indeed, it is hard to see how a national judge could characterize an act as aggression, if the Council, which bears the primary responsibility for peace-keeping, had not found it to be so. On the other hand, everyone knows that the Council can be paralysed by the exercise of the veto. Decisions of the courts would therefore be subordinate to those of the Council. It is not certain that the security of law would benefit therefrom. To suggest that decisions of the Security Council, a political organ if ever there was one, should serve as a direct basis for national courts when they are called upon to establish individual culpability and determine the severity of the penalty does not seem to be in keeping with a sound conception of justice. Accordingly, it would be just as well not to include paragraph 5 which appears in square brackets.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

42. With the exception of paragraphs 1 and 2, the draft adopted on first reading was the subject of numerous criticisms by Governments, which observed that:

(a) Paragraph 3, on evidence of aggression, does not seem to belong in a definition of aggression;

(b) The enumeration of acts of aggression given in paragraph 4 is not exhaustive;

(c) Moreover, the Security Council may conclude that "a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances" (para. 3);

(d) Paragraph 4 (h) states that, in addition to the acts listed, any other acts may be "determined by the Security Council as constituting acts of aggression under the provisions of the Charter";

(e) Paragraph 5 makes national courts subordinate to the Security Council, which is a political organ;

(f) Paragraphs 6 and 7, on the scope of the Charter and on the self-determination, freedom and independence of peoples, are political provisions and do not belong in a legal definition.

43. These criticisms, echoing many others made on the occasion of earlier attempts to define aggression, prompt the Special Rapporteur to ask the following question: "Is a legal definition of the concept of aggression possible?".

44. Mr. Jean Spiropoulos, the previous Special Rapporteur of the International Law Commission on the draft Code of Offences against the Peace and Security of Mankind, asked himself the same question in 1951. The conclusion he came to was that: "the notion of aggression is a notion per se, a primary notion, which, by its very essence, is not susceptible of definition ... A 'legal' definition of aggression would be an artificial construction which, applied to concrete cases, could easily lead to conclusions which might be contrary to the 'natural' notion of aggression ...". 5/

45. This was also the position taken by another specialist in international criminal law, Mr. Stefan Glaser, who wrote that the concept of aggression had yet to be defined successful in international law. The enumerative definition found in the London treaties of 1933 (the so-called Litvinov-Politis definition), when put to the test, had revealed lacunae and had failed to cover all the cases of aggression that had arisen in the international arena ... Since then, all efforts made within the League of Nations, and subsequently under the auspices of the United Nations, to arrive at a satisfactory definition of aggression had failed. The experts of different international organizations entrusted with the task had reached the conclusion that the concept of aggression was, in fact, legally undefinable, meaning that it did not lend

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5/ Yearbook of the International Law Commission, 1951, vol. II, document A/CN.4/44, paras. 165 and 166.

itself to an analytical definition; no matter how detailed that definition might be, it would never be exhaustive. 6/

46. Indefatigable, the international community pursued its efforts, which culminated in General Assembly resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression. However, this resolution was adopted by the Assembly without a vote.

47. Nowadays, many Governments doubt whether it can serve as the basis for a legal definition of aggression or as the justification for a judicial decision.

48. In these circumstances, the Commission has three options: it can refer to aggression without defining it, it can limit itself to a general definition or it can accompany the general definition by a non-limitative enumeration.

49. This last method has often been adopted in international conventions defining international crimes, for instance, in the Martens clause of the preamble to the Convention concerning the Laws and Customs of War on Land of 1907 and in the Charter of the Nürnberg International Military Tribunal, where article 6 (b) on violations of the laws or customs of war, states that such violations shall include, "but not be limited to", murder, ill-treatment, etc.

50. The same approach was taken only recently in the Statute of the International Criminal Tribunal for the former Yugoslavia and was also used in the 1954 draft Code of Offences against the Peace and Security of Mankind, which defined such offences as "inhuman acts such as ...".

2. New text proposed by the Special Rapporteur

51. Recognizing the impossibility of enumerating all acts that would constitute aggression, the Special Rapporteur proposes the following general definition:

"Aggression

1. An individual who as leader or organizer is convicted of having planned or ordered the commission of an act of aggression shall be sentenced to ...

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."

6/ Droit international pénal conventionnel (Brussels, Ed. Emile Bruyont, 1970), pp. 6 ff.

3. Commentary

52. What now remains is to answer an important question raised by one Government, namely: are we to criminalize acts of aggression or wars of aggression?

53. According to that Government, the distinction between an act of aggression and a war of aggression is based on the fact that an act of aggression is less serious than a war of aggression and does not have the same legal consequences. An act of aggression is simply a wrongful act which results in the international responsibility of the State which committed it, whereas a war of aggression results in the criminal liability of the leaders of that State.

54. It is questionable whether the distinction between the concepts of act of aggression and war of aggression is clear-cut. Are not some acts of aggression, such as the invasion or annexation of territory or the blockading of the ports of a State, sufficiently serious to constitute crimes? We should avoid further complicating what is, intrinsically, already an extremely complex issue.

Article 19. Genocide

A. Text of the draft

55. The draft article approved on first reading was the following:

"1. An individual who commits or orders the commission of an act of genocide shall, on conviction thereof, be sentenced to ...

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group."

B. Observations of Governments

Australia

56. While Australia has no difficulties with the substance of this article, which is based entirely on the definition in article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the issue of the applicable penalty requires further attention by the Commission.

57. The Government believes that the penalty to be specified in article 19 (1) may well be inconsistent with the Genocide Convention, which requires States parties to "provide effective penalties for persons guilty of genocide".

Ecuador

58. The Government believes that paragraph 2 (d) should be clarified. As currently drafted, it is vague and could create misunderstanding and confusion between purely social birth control programmes and crimes of genocide.

Paraguay

59. The Government of Paraguay notes that the crime of genocide was defined in an earlier international convention adopted in 1948 and that the definition remains unchanged in this instrument. If any change is to be made, paragraph 2 (e) could be expanded to cover adults as well as children.

United Kingdom

60. According to the United Kingdom, the Commission should consider the relationship between the Code and article IX of the Genocide Convention, which provides for the compulsory jurisdiction of the International Court of Justice in the case of disputes between Contracting Parties relating, inter alia, to the responsibility of a State for genocide.

United States

61. The United States Government notes that the crime of genocide is already defined by the Convention on the Prevention and Punishment of the Crime of Genocide, to which the United States and many other States are parties. United States ratification of the Convention was based on several understandings. In particular, the United States indicated that it understands that the term "intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such", as used in the Convention, means the "specific intent to destroy, in whole or substantial part, a national, ethnic, racial or religious group as such" by the acts prohibited in the Convention. The Code's definition, in contrast, fails to establish the mental state needed for the imposition of criminal liability.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

62. Many amendments have been proposed to both the form and the substance, but the Special Rapporteur considers it preferable to stay close to the Genocide Convention, since genocide is the only crime on which the international community is in very broad agreement.

2. New text proposed by the Special Rapporteur

63. The Special Rapporteur therefore proposes the following new text:

"Genocide

1. An individual convicted of having committed or ordered the commission of an act of genocide shall be sentenced to ...

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. An individual convicted of having engaged in direct and public incitement to commit genocide shall be sentenced to ...

4. An individual convicted of an attempt to commit genocide shall be sentenced to ...".

Article 21. Systematic or mass violations of human rights

A. Text of the draft

64. The draft article adopted on first reading is the following:

"An individual who commits or orders the commission of any of the following violations of human rights:

- Murder;
- Torture;
- Establishing or maintaining over persons a status of slavery, servitude or forced labour;
- Persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- Deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to ...]."

B. Observations of Governments

Australia

65. Australia notes the stated intention of the Commission that only the most serious international delicts be considered as crimes. This is consistent with the philosophical basis of international criminal law and the expressed attitude of States on the matter.

66. There are, however, some problems with draft article 21 in its current form. In particular, Australia has concerns about the lack of definition of the elements of the crimes set out in this draft article. It notes the view of the Commission that, as the definitions are included in other international instruments, it is unnecessary to repeat them in the Code. However, not all the crimes are so defined. There is, for example, no agreed definition of persecution in any international instrument.

67. Reliance on other instruments for definitions of the crimes in article 21 could also cause difficulties. For example, the definition of torture in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment limits the crimes to acts committed by public officials or persons acting in an official capacity. In contrast, the chapeau to article 21 indicates that responsibility for any of the enumerated crimes extends to any individual committing the offence.

68. Australia notes in this regard that draft articles 15, 19, 20, 22 and 23 include definitions of offences despite the fact that definitions are to be found in other international instruments.

69. Draft article 21 is also limited in its scope in that it does not (as in the case with draft articles 15 and 16) allow for "other similar acts". Australia agrees with the observation set out in the Commission's commentary that the practice of systematic disappearance of persons is worthy of special reference in the context of this draft article. It is not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances.

Austria

70. The Austrian Government notes that the relation between the provisions of article 21 and article 22 (ideal concurrence of crimes or cumulation) asks for further clarification. If article 21 should only be applicable in times of peace, this should be emphasized.

Brazil

71. In the view of the Brazilian Government, in the case of article 21, although it is entitled "Systematic or mass violations of human rights", the text could be read as implying that individual cases of murder or torture would be crimes against the peace and security of mankind. It seems necessary, therefore, to clarify the scope of the limitative expression "in a systematic manner or on a mass scale", in order to indicate that the Code will only cover facts of international relevance committed or not with the toleration of the State power.

Bulgaria

72. The Bulgarian Government proposes that in article 21 the expression "persecution on social, political, racial, religious or cultural grounds" be supplemented by the expression "including inhuman and degrading treatment based on such grounds".

Paraguay

73. In the view of the Paraguayan Government, the crime covered in article 21 is similar to the crime of genocide (art. 19), as can be seen by comparing the provisions of the two articles. However, this article does not mention the underlying motive for the crime of genocide, and it refers to systematic or mass violations of human rights. The differences do not seem to be fundamental.

United Kingdom of Great Britain and Northern Ireland

74. The United Kingdom believes that attention must plainly be paid to systematic or mass violations of human rights in any code of crimes under international law. Two requirements must be met before an act qualifies as "systematic or mass violations of human rights": the exceptional seriousness of the act and its systematic manner or mass scale. The express list of acts is welcome, but the article is incomplete and unsatisfactory. The commentary makes clear that definitions of the terms used, such as torture or slavery, are to be found in existing international conventions. Even assuming that national courts would be able to identify the relevant source, the definitions contained therein

are not free from controversy. Indeed, as the commentary indicates, there may be doubt whether the definition of torture contained in the Torture Convention should be limited to the acts of officials. As currently drafted, the article contains no precise definition of criminal conduct nor any clear unifying concept.

United States of America

75. The United States Government is of the view that article 21 is too vague to impose criminal liability. The crime of "persecution on social, political, racial, religious or cultural grounds" in particular is so vague that it could mean almost anything. For example, one definition of "persecute" is "to annoy with persistent or urgent approaches, to pester". 4/ It should not be an international crime for one political party to "annoy" or "pester" another political party, yet under the plain meaning of the draft Code that could be an international crime. This article also fails to fully consider the effect of the International Covenant on Civil and Political Rights, 5/ which spells out the specific human rights recognized by the vast majority of the international community. This article also appears to embrace common crimes, such as murder. The United States does not believe that it would be useful or even sensible to make every murder an international crime. We note further that deportation of persons may under many circumstances be lawful; this current formulation is thus overly broad.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

76. One Member State notes that the list of acts constituting crimes against humanity is too limited, as it does not include the term "other inhumane acts".

77. This comment is valid. It is impossible to provide a complete list of acts constituting such crimes. The Charter of the Nuremberg Tribunal (art. 6 (c)), the Charter of the Tokyo Tribunal (art. 5 (c)) and Law No. 10 of the Allied Control Council for Germany (art. II, para. 1 (c)) used the term "other inhumane acts".

78. More recently, the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 refers also, in the definition of crimes against humanity, to "other inhumane acts" (art. 5 (i)).

79. Concerning torture, one Member State comments that the draft adopted on first reading does not provide a definition of this concept and is confined to referring in its commentary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the scope of application of this Convention is limited to acts committed by agents or representatives of a State.

80. The Special Rapporteur recognizes that the comment regarding possible perpetrators of crimes against humanity is valid and that individuals must also be covered. As to the definition of torture, the Special Rapporteur placed in brackets the overly long definition contained in the Convention against Torture. The Commission must decide whether or not to retain it.

81. Another comment relates to the word "persecution", for which no definition is given.

82. It should be recalled that "persecution" is used in the three basic texts relating to the charters of the international military tribunals which defined crimes against humanity. It is used also in judgements of the international tribunals which had to judge crimes against humanity following the Second World War.

2. New text proposed by the Special Rapporteur

83. The Special Rapporteur therefore proposes the following new text:

"Crimes against humanity

"An individual who, as an agent or a representative of a State or as an individual, commits or orders the commission of a crime against humanity shall, on conviction thereof, be sentenced [to ...].

"A crime against humanity means the systematic commission of any of the following acts:

"- Wilful killing;

"- Torture [i.e., intentionally inflicting on a person pain or acute physical or mental suffering for the purposes of, inter alia, obtaining information or confessions from him or from a third person, punishing him for an act which he or a third person has committed or is suspected of committing, intimidating or exerting pressure on him, intimidating or exerting pressure on a third person, or for any other reason grounded in some form of discrimination.

This text does not include pain or suffering resulting solely from lawful punishment or inherent in or caused by such punishment.];

"- Reduction to slavery;

"- Persecution;

"- Deportation or forcible transfer of population;

"- All other inhumane acts."

3. Commentary

84. In this new text, the Special Rapporteur preferred to use the title "Crimes against humanity" rather than the title adopted on first reading, which was "Systematic or mass violations of human rights".

85. The term "crimes against humanity" is, in fact, an established term which has been enshrined in the legal lexicon, since it is used even in domestic law. Since the end of the Second World War this term has existed in numerous legal instruments. 7/ Still more recently it has been used in the Statute of the International Criminal Tribunal for the former Yugoslavia. 8/

86. If the current draft abandoned the term "crimes against humanity", questions might arise as to the reasons for such a reversal. Would the Commission have a good reason for replacing "crimes against humanity" with "systematic or mass violations of human rights"? It appears doubtful.

87. In proposing this latter term, the Commission wished to emphasize two aspects of such crimes which it deemed very important, namely, their systematic and their massive nature.

88. However, one of these two aspects (the mass element) is too controversial. Those who hold that a crime against humanity is characterized by its massive nature rely on the fact that the charters of the tribunals referred to above define crimes against humanity as acts "directed against the civilian population" or "any civilian population". They believe that, because of their large numbers of victims, such crimes are necessarily mass crimes.

89. However, contrary to this argument, many authors and even a good number of judicial precedents hold that a crime against humanity is not necessarily a crime of a massive nature. They note that some acts referred to in the texts are not necessarily mass crimes: murder, torture and rape, as referred to in Law No. 10, can as easily be directed against individual victims as collective victims.

90. According to Mr. Henri Meyrowitz, "Nothing supports the claim that such crimes which, in common law, are deemed to have occurred where there is only a single victim, are not apt to constitute crimes against humanity. Even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution." 9/

7/ Charter of the Nuremberg International Military Tribunal (art. 6 (c)); Charter of the International Military Tribunal for the Far East (art. 5 (c)); Law No. 10 of the Allied Control Council for Germany (art. II (c)).

8/ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (art. 5).

9/ Henri Meyrowitz, La répression par les tribunaux allemands des crimes contre l'humanité (Paris, LGDJ, 1960).

91. Similarly, Mr. Sawicks, in his report to the Eighth International Conference for the Unification of Penal Law, wrote: "Crimes against humanity usually occur en masse. Yet this is not the characteristic which distinguishes this type of crime from an ordinary crime. The mass element is an accessory, although not an incidental, feature." 10/

92. This controversy occurs also at the level of jurisprudence. The argument as to massive nature was upheld chiefly by the American tribunals. Thus, in Case III, 11/ the defendants were accused of having knowingly participated in a system of cruelty and injustice extending throughout the country ... violating the laws of war and of humanity. The judgement stated that isolated cases of atrocities and persecution were to be excluded from the definition.

93. However, that was not the opinion of the tribunals in the British zone which, on the contrary, stated that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims. In general, the argument upheld by the tribunals in the British zone was that what counted was not the mass aspect, but the link between the act and a cruel and barbarous political system, specifically, the Nazi regime.

94. After an extensive review of the jurisprudence of the tribunals in the British zone, Mr. Meyrowitz concluded: "The tribunals in fact decided that what renders an offence a crime against humanity is neither the number nor the nature of the victims, but the fact that the offence is linked to systematic persecution of a community or a section of a community. An inhumane act committed against a single individual can also constitute a crime against humanity." Mr. Meyrowitz based this conclusion in particular on a clarification from the British military government (Zonal Office of the Legal Adviser) dated 15 October 1948, 12/ stating that an individual crime can constitute a crime against humanity "if the motive for this act resides, in whole or in part, in such systematic persecution".

95. It follows from the foregoing that the notion that a crime against humanity must be of a massive nature is controversial and that "the characterization of crimes against humanity should in fact be interpreted as including, alongside acts directed against individual victims, acts of participation in mass crimes".

96. On the other hand, the systematic nature of crimes against humanity, far from being a subject of dispute, constitutes a necessary condition.

97. For this reason, the Special Rapporteur deemed it necessary to replace the title of the draft adopted on first reading with the title "Crimes against humanity"; far from being a subject of dispute, it has been adopted by Member States, which have incorporated it into their domestic law.

10/ Acts of the Conference, p. 135.

11/ American Military Tribunal, Case III, vol. III, p. 985; cited in Meyrowitz, op. cit., pp. 252 and 253.

12/ Meyrowitz, op. cit., p. 280 in fine.

Article 22. Exceptionally serious war crimes

A. Text of the draft

98. The draft article adopted on first reading is the following:

"1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

"2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) Acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) Establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) Use of unlawful weapons;

(d) Employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) Large-scale destruction of civilian property;

(f) Wilful attacks on property of exceptional religious, historical or cultural value."

B. Observations of Governments

Austria

99. The Austrian Government believes that the expression in square brackets in article 22, paragraph 2 (a), should be retained. The fact that the enumeration is only descriptive is sufficiently emphasized by the words "in particular".

Paraguay

100. The Paraguayan Government notes that there are already many international conventions on war crimes, and these are referred to in the commentary on this article. It is legitimate to ask whether there is any need to have yet another category of crime, namely exceptionally serious war crimes, and whether degree of seriousness is a sound criterion to use in defining an offence for which

other characterizations already exist. Degree of seriousness is, however, a valid criterion to use in determining the severity of the punishment.

United Kingdom of Great Britain and Northern Ireland

101. The United Kingdom is of the view that in opting for a "middle-ground solution", reconciling competing trends within the Commission, the Commission risks proliferating the categories of war crimes without any attendant benefit. If the Commission were to retain this article, the United Kingdom would prefer to see a provision which accords with existing characterizations of war crimes, replacing "exceptionally serious war crimes" with "grave breaches of the Geneva Conventions", for example.

United States of America

102. The United States Government is of the view that article 22 seeks to punish "exceptionally serious war crimes", a term which is tautologically defined as "an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of, inter alia, acts of inhumanity ...". This article is too vague and fails to consider and specifically incorporate the relevant provisions of the many international conventions specifically dealing with the law of armed conflict.

103. The vague prohibition on the "unlawful use of weapons" does not reflect the complex realities of warfare or the international legal mechanisms established to regulate its conduct. Moreover, the United States thinks it unwise to include only "exceptionally serious war crimes" and ignore other breaches of the laws of war that are also of great concern to the peace and security of mankind.

Switzerland

104. Switzerland believes that in international humanitarian law, there are now two categories of violations: on the one hand, there are "grave breaches" which have already been enumerated (arts. 50, 51, 130 or 147, depending upon which of the four Geneva Conventions of 1949 one is consulting, and art. 85 of Protocol I additional to the Geneva Conventions which also refers to article 11 of the same Protocol); these are also called war crimes; on the other hand, there are all the other violations of international humanitarian law.

105. The Commission, faithful to the principle that only extremely serious acts should be included in the Code, proposes to introduce a third category, that of "exceptionally serious war crimes", which would therefore encompass especially serious "grave breaches". Accordingly, we must realize that, once the Code is in force, war crimes not enumerated in this provision may, as a result of article 22, be subject only to a relatively light penalty.

106. In addition, the Swiss Government finds it hard to understand why the Commission characterized "large-scale destruction of civilian property" (para. 2 (e)) as an "exceptionally serious war crime", but not attacks against the civilian population or demilitarized zones, or perfidious use of the protective emblems of the Red Cross and the Red Crescent.

107. It would, therefore, be advisable for the Commission to reconsider the impact which this provision is liable to have on international humanitarian law, before adopting it on second reading.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

108. The comments from Member States unanimously express reservations concerning this new concept of exceptionally serious war crimes.

109. After extensive reflection, the Special Rapporteur has found these reservations to be valid, mainly because it is difficult in practice to establish an exact dividing line between the "grave breaches" defined in the Geneva Conventions and Additional Protocol I and the "exceptionally grave breaches" stipulated in the draft adopted on first reading.

2. New text proposed by the Special Rapporteur

110. The Special Rapporteur therefore proposes to amend the title and content of the draft as follows:

"War crimes

"An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced to [...].

"For the purposes of this Code, a war crime means:

"1. Grave breaches of the Geneva Conventions of 1949, namely:

(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) Compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement of a civilian;

(h) Taking civilians as hostages.

"2. Violations of the laws or customs of war, which include, but are not limited to:

(a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) Seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) Plunder of public or private property."

3. Commentary

111. In this new draft, the method of defining war crimes is based directly on the Statute of the International Criminal Tribunal for the former Yugoslavia.

112. This method distinguishes grave breaches which, as in the Geneva Conventions and Additional Protocol I, form an exhaustive list, from other violations of the laws or customs of war, which form a non-exhaustive list.

113. This new draft should make it possible to conclude the lengthy debate in the Commission between supporters of an exhaustive list of war crimes and supporters of a non-exhaustive list.

Article 24. International terrorism

A. Text of the draft

114. The draft article adopted on first reading is the following:

"An individual who is an agent or representative of a State commits or orders the commission of any of the following acts:

- undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public shall, on conviction thereof, be sentenced [to ...]."

B. Observations of Governments

Australia

115. Australia has difficulties with the drafting of article 24. It notes in particular that the definition is not expressed to include an element of violence. Is therefore the offence intended to encompass non-physical acts of terror such as propaganda? Further, it is uncertain whether the agents or representatives need to be acting in their official capacity. The absence of intention or motive from the definition (cf. the 1937 Convention for the Prevention and Punishment of Terrorism) also needs explanation.

Austria

116. The Austrian Government proposes that article 24 should be amended as follows, which would also allow a definition of the term "terrorist activities":

> "1. An individual who, as an agent or representative of a State, commits or orders the commission of any of the following acts:
>
> - undertaking, organizing, assisting, financing, encouraging or tolerating terrorist activities against another State, shall be sentenced (to ...).
>
> "2. Terrorist activities are acts directed at persons or property of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public."

Belarus

117. The Government of Belarus believes that in article 24, the category of perpetrators of crimes of international terrorism should be expanded. The Code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind.

Brazil

118. The Brazilian Government is of the view that there is an international element in the crime of terrorism ("as an agent or representative of a State ... against other State") meaning that the crime described in article 24 may only be punished in accordance with the Code when it is committed or ordered by an agent or representative of a State against another State.

Norway

119. In the view of the Norwegian Government, the scope of the provision is too narrow from a substantive point of view. It is difficult to understand why only cases where the terrorist is "an agent or representative of a State" should be covered. The other crimes included in the draft Code are not subject to such a

limitation provided that individuals can contravene these provisions without acting on behalf of a State. The majority of the crimes that could conceivably fall within this article are of such a nature that they are generally covered by national criminal legislation as well as specific conventions. There is, therefore, reason to presume that in many cases, conflicting penal provisions are to be found in national criminal law.

Paraguay

120. The Paraguayan Government notes that the article covers terrorism, not as committed by individuals or private groups, but by agents or representatives of a State, cases of which exist in the international community today.

United Kingdom of Great Britain and Northern Ireland

121. The United Kingdom regrets that the Commission has, as in the 1954 Draft, limited the scope of the article to State-sponsored terrorism. International terrorism is no longer confined to the acts of agents or representatives of States. In attempting to distinguish between international and "internal" terrorism, the Commission has overlooked the important category of non-State-sponsored terrorism directed at States, which properly belongs in a definition of international terrorism. The United Kingdom would therefore urge the Commission to reconsider the definition of terrorism, including the present omission of "internal" terrorism. The latter is in practice more of a problem for many States than international terrorism. It should consider also the relationship of this article with international crimes omitted from the Code, such as hijacking and hostage-taking, which might fall within the present definition of international terrorism.

United States of America

122. In the view of the United States Government, article 24 purports to punish international terrorism, even though there is no generally accepted definition of "terrorism" and no adequate definition of terrorism is given by the Code. The Code attempts to define terrorism through the use of a tautology. The Code defines terrorism as the "undertaking, organizing, assisting, financing, encouraging or tolerating [by the agents or representatives of a State of] acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public". This definition is patently defective because "terror" is not defined.

123. Moreover, given the unsuccessful history of past attempts to achieve a universally acceptable general definition of terrorism, the United States is sceptical about the possibility of reaching consensus on such a provision, no matter how it is drafted. In response to the difficulty in reaching consensus on a general definition of terrorism, the international community has instead concluded a series of individual conventions that identity specific categories of acts that the entire international community condemns, regardless of the motives of the perpetrators, and that require the parties to criminalize the specified conduct, prosecute or extradite the transgressors and cooperate with other States for the effective implementation of these duties. As listed in

General Assembly resolution 44/29 of 4 December 1989, these conventions cover aircraft sabotage, aircraft hijacking, attacks against officials and diplomats, hostage-taking, theft or unlawful use of nuclear material, violence at airports and certain attacks on or against ships and fixed platforms. By focusing upon specific types of actions that are inherently unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism.

124. Another fundamental problem with article 24 of the Code is that it limits the crime of terrorism to acts committed by "agents or representatives of a State." In fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law.

Switzerland

125. To the Swiss Government, it would appear that the elements constituting the crime of international terrorism might not, depending on circumstances, be clearly distinguished from those constituting intervention, defined as the act of intervening in the internal or external affairs of a State by fomenting subversive or terrorist activities. Does the act, when carried out by agents of a State, of financing or training armed bands for the purposes of sowing terror among the population and thus encouraging the fall of the Government of another State come under either provision?

C. Point of view of the Special Rapporteur

1. Explanatory remarks

126. Most Member States criticized the notion of limiting possible perpetrators of the crime of international terrorism to agents or representatives of a State. They believe that terrorism can also be committed by individuals acting on behalf of private groups or associations.

127. This criticism is both relevant and valid.

128. One Member State, sceptical about the possibility of reaching consensus on a general definition of terrorism, believes that the international community should continue to conclude specific conventions, such as the conventions covering hostage-taking, attacks against officials and diplomats, etc.

129. While such an approach is, of course, conceivable, it does not preclude a search for the common features of these various forms of terrorism and an effort to derive common rules applicable to their suppression and punishment. While it may be difficult to arrive at a general definition of terrorism, it is not impossible. The Convention of 16 November 1937 contained a definition of this concept; we should strive to improve it.

2. New text proposed by the Special Rapporteur

130. The Special Rapporteur proposes that the draft adopted on first reading should be amended as follows:

"International terrorism

"1. An individual who, as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced [to ...].

"2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups of persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way."

3. Commentary

131. The new draft includes individuals as perpetrators of international terrorism, whether acting alone or belonging to private groups or associations.

132. It clarifies the aim sought by terrorism, which is to seek advantage or influence the action or political orientation of a government or change the constitutional form of a State.

133. The aim of terrorism is not to cause terror. Terror is not an end in itself but a means. Some commentaries express regret at the tautology that arises from using the word "terror" to define terrorism. This is why the Special Rapporteur used the words "fear" and "dread" in brackets. However, this lexical criticism is truly minor.

Article 25. Illicit traffic in narcotic drugs

A. Text of the draft

134. The draft text adopted on first reading is the following:

"1. An individual who commits or orders the commission of any of the following acts:

- undertaking, organizing, facilitating, financing or encouraging illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

"2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property.

"3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law."

B. Observations of Governments

Australia

135. Australia strongly supports international action to deal with illicit trafficking in narcotic drugs and psychotropic substances. Accordingly, Australia has been an active participant in the negotiation of multilateral conventions which promote both national and international action against drug trafficking.

136. Australia acknowledges the concerns underlying article 25. It believes, however, that more detailed work needs to be done on a number of issues, including the relationship of article 25 with existing conventions, in particular, the 1988 United Nations Convention.

137. The enumerated acts constituting crimes under article 25 are inconsistent with those listed in the 1988 United Nations Convention. Article 3 of that Convention describes a lengthy series of acts which are to be established as offences under domestic law. Although many of these appear to have been omitted on the ground that they are not of sufficiently serious nature to attract international criminal sanctions, others perhaps should be included.

138. The enforcement of any article dealing with drug trafficking would depend heavily on effective provisions on extradition of alleged offenders, mutual legal assistance between States in support of their prosecution and money laundering.

139. Consideration also needs to be given to the relationship between the jurisdiction of national legal systems to deal with drug offences and any proposed international jurisdiction under the Code.

140. It is unclear why the phrase "psychotropic drugs" is used only in paragraph 3, when the whole article is intended to cover these substances.

Austria

141. In the view of the Austrian Government, it remains to be seen if this crime should be inserted in the present code of crimes. It is doubtful whether illicit traffic in narcotic drugs crime against the peace and security of

mankind. Furthermore, the consequences linked with the insertion of the Code (i.e., the non-prescriptibility) do not seem desirable from a political point of view.

Brazil

142. The Brazilian Government believes that the absence of an international element with regard to the crime in article 25 (Illicit traffic in narcotic drugs) is not justifiable.

United Kingdom of Great Britain and Northern Ireland

143. The United Kingdom notes that the 1954 Draft Code omitted drug-related crimes, along with piracy, traffic in women and children, counterfeiting and interference with submarine cables. The United Kingdom would have wished for a more detailed analysis of these crimes with a view to ascertaining whether they constitute crimes against the peace and security of mankind. It is the opinion of the United Kingdom that drug trafficking, though an international crime, is a borderline case for inclusion in a code as a crime against the peace and security of mankind. It may be asked what is to be gained by including in the Code an activity which is viewed as criminal by the great majority of States, and effectively prosecuted as such by most of them.

United States of America

144. The United States Government notes that article 25 provides that trafficking in "narcotic drugs" is "illicit" if it is "contrary to internal or international law". It is unclear whether the reference to internal law is meant to refer only to the law of the State in which the individual is located (in which case it has little point) or whether it is meant to include the internal law of any State that is a party to the Code (in which case it would be amazingly broad).

Switzerland

145. In the view of the Swiss Government, the question arises as to whether the inclusion in the Code of a provision on international drug trafficking is warranted. After all, such traffic can be regarded as a common crime, motivated mainly by greed. Such an approach, however, disregards an evolution which has revealed ever closer links between international drug trafficking and local or international terrorism. It is not without good reason that people commonly speak of "narcoterrorism". Apart from the harmful effects it has on health and well-being, international drug trafficking has a destabilizing effect on some countries and is therefore an impediment to harmonious international relations. In this connection, international drug trafficking indeed appears to be a crime against the peace and security of mankind. The Commission is therefore correct to include, in the draft Code, a provision criminalizing such traffic, whether it is carried out by agents of a State or simply by individuals.

C. Point of view of the Special Rapporteur

1. Explanatory remarks

146. The Special Rapporteur explained in the introduction to the present report the reasons why he believed it necessary to retain in the draft the reference to illicit traffic in narcotic drugs on a large scale or in a transboundary context.

147. The phrase "on a large scale or in a transboundary context" refers not only to international illicit traffic in narcotic drugs, but also to domestic traffic on a large scale. It should not be forgotten that many small States are unable to prosecute perpetrators of such traffic where it is carried out on a large scale in their own territory. They would like for there to be an international jurisdiction with competence to try offences of this type.

2. New text proposed by the Special Rapporteur

148. Here is the proposed new text, which simplifies the one adopted on first reading:

"Illicit traffic in narcotic drugs

"1. An individual who commits or orders the commission of illicit traffic in narcotic drugs on a large scale or in a transboundary context shall, on conviction thereof, be sentenced [to ...].

"2. Illicit traffic in narcotic drugs means undertaking, organizing, facilitating, financing or encouraging any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

"3. For the purposes of paragraph 2, facilitating or encouraging illicit traffic in narcotic drugs includes the acquisition, holding, conversion or transfer of property by an individual who knows that such property is derived from the crime described in this article in order to conceal or disguise the illicit origin of the property."